Dyson Manufacturing Sdn Bhd v Ketua Pengarah Kastam, Jabatan Kastam Diraja Malaysia

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-01(A)-773–10 OF 2022
NANTHA BALAN, MOHD NAZLAN AND CHOO KAH SING JJCA
8 MARCH 2024

Civil Procedure — Judicial review — Application for — Appeal against High Court in dismissing judicial review application — Respondent issued bill of demand for imposition of tax under Goods and Services Tax Act 2014 ('GST Act') in respect of supply of services by appellant to its related company which was based outside Malaysia — Whether supply of services by appellant to its related foreign company which was registered under GST Act ought to be construed as zero-rated supply under GST Act regime where former was also registered as agent of latter under GST Act

This was an appeal against the judgment of the High Court in dismissing the appellant's judicial review application for a certiorari under O 53 of the Rules of Court 2012. The appellant was a locally incorporated company and was involved in the business of manufacturing of Dyson products. It also provided research, design and development services. It was also a registered taxable person under s 20 of the Goods and Services Tax Act 2014 ('the GST Act'). The appellant undertook research, design and development ('R&D') activities and services for the DYSON brand products on a contract basis to its related company — Dyson Operation Pte Ltd ('DOPL') which was a company incorporated and operating in Singapore. This was carried on pursuant to the R&D services and supply agreement ('the R&D agreement') executed between the two. Apart from the R&D services provided by the appellant to DOPL, finished goods manufacturing activities were undertaken by way of contract manufacturing and outsourcing to the contract manufacturer. The appellant therefore manufactured various Dyson products through third party contract manufacturers which then sells the Dyson products to DOPL, which was said to be acting as a principal in its own right. In turn, DOPL, without the involvement of the appellant, resold — this being a direct sale by DOPL arranged from Singapore — these Dyson products to Dyson Exchange Ltd or Dyson Technology Ltd based in the United Kingdom, which subsequently sold these products to distributors located both inside and outside Malaysia. As the total value of the taxable supplies exceeded RM500,000 every year, DOPL was required to register for GST under ss 12 and 20 of the GST Act. Since DOPL was considered to be operating outside the country, this in turn triggered the requirement for DOPL to appoint an agent under s 65(6) of the GST Act in order to register for GST purposes. The appellant was thus appointed as an

agent on behalf of the DOPL, and as the agent, the appellant was liable to meet all the responsibilities of DOPL under the GST Act. On 27 June 2018, the respondent notified the appellant that pursuant to an audit performed on the appellant company during the period between 1 April 2015 and 31 December 2017 it was found that the appellant was in breach of s 9 of the GST Act, and stated that 6% GST should have been charged and collected from DOPL in respect of the appellant's supply of R&D services to DOPL. The respondent, pursuant to s 43(8) of the GST Act issued its impugned decision to the appellant in the form of a bill of demand for the amount of GST output tax which was said to have been under declared by the appellant, which was a total sum of RM23,932,158.69. The appellant sought to quash the respondent's decision but was refused by the High Court. Hence, this appeal.

Held, allowing the appeal:

(1) Taxing statute such as the GST Act should be strictly interpreted with no words or meaning to be implied. And that ambiguity, if any, must be construed in favour of the taxpayer such that absent clear legislative provision, in this case, the respondent could not deem DOPL as a person belonging in Malaysia under the zero-rated order purely on the basis that DOPL was GST registered in Malaysia. DOPL fell within the scope of s 65(6) of the GST Act which compelled the entity making taxable supplies in Malaysia (thus requiring registration under s 20) who was not a person who belonged in this country to comply with the requirement to appoint an agent. Nowhere in the GST Act did it state that just because a foreign person (such as DOPL) made supplies in Malaysia it must necessarily be one 'belonging in Malaysia'. Since DOPL was a person not belonging in Malaysia under s 65(6) of the GST Act, it must necessarily follow that DOPL was also a person who was not belonging in Malaysia under para 2(2) of the zero-rated order. The determination that a person such as DOPL met the test for not belonging in Malaysia for the purposes of ss 65(6) and 65(8) of the GST Act, while at the same time held to have met the same test for belonging in Malaysia for the purposes of para 2(2) of the zero-rated order, in effect resulting in diametrically opposite conclusions under the GST Act and the zero-rated order was both logically and legally flawed. DOPL was 'not belonging in Malaysia' at the time the R&D services were supplied because even the respondent averred that DOPL did not have a business or fixed establishment which required it to appoint an agent under s 65(6) of the GST Act; and neither did the respondent furnish any proof that DOPL had employees working in Malaysia or had a physical office in Malaysia, at the material time when the R&D services were rendered. As such, the GST-registered status of DOPL or its appointment of an agent under s 65(6) of the GST Act did not without more render DOPL to be a person 'belonging in Malaysia'. DOPL should as such also be a person 'not belonging in Malaysia' for the

purposes of the zero-rated order that ought therefore to have qualified the appellant for a zero-rated GST on its supply of R&D services to DOPL (see paras 43, 45, 48, 50, 56 & 58).

(2) On a true construction of s 65(6) of the GST Act, the appointment of the appellant as a GST agent did not result in DOPL being considered to be a person belonging in Malaysia, as incorrectly found by the High Court, but that instead s 65(6) of the GST Act highlighted that the appellant was deemed not to belong in Malaysia vis a vis its agency functions. The conclusion of the learned High Court judge that by virtue of the appellant's appointment as DOPL's agent under s 65(6) of the GST Act, the appellant was construed as DOPL's 'fixed establishment' in Malaysia, resulting in DOPL being considered to be belonging in Malaysia for the purposes of the zero-rated order — thus refusing the claim of the appellant for zero-rated GST in respect of the supply of R&D services to DOPL — to have been made in error. The High Court had not correctly construed s 65(1) of the GST Act in holding that the appellant's appointment under s 65(6) of the GST Act meant that the appellant's supplies were deemed to be made by DOPL under s 65(1) of the GST Act, such that DOPL was erroneously considered to be in Malaysia at the time the services were provided. The R&D services provided by the appellant to DOPL was a zero-rated supply because firstly, it was supplied under the R&D agreement; secondly, DOPL was a 'person who belongs in a country other than Malaysia'; and thirdly the R&D services directly benefitted DOPL who was outside Malaysia at the time the R&D services were performed. In making the impugned decision, the respondent had so manifestly taken into consideration factors that ought not to have been taken into account and had at the same time failed to take into account factors that ought to have been taken into consideration. The respondent did not also adequately consider the express provisions of the GST Act and zero-rated order, the well-established principles of construction of taxing statutes, and the generally understood concept of GST that was concerned with the levy on the supply of goods or services made within local jurisdiction (see paras 74–75, 78 & 84–85).

(3) The decision of the respondent issuing the bill of demand imposing 6% GST was therefore wrong, constituted an error of law and an illegality. The bill of demand was thus quashed by an order of certiorari and the decision of the High Court was set aside (see paras 89–90).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap penghakiman Mahkamah Tinggi yang menolak permohonan semakan kehakiman perayu untuk certiorari di bawah A 53 Kaedah-Kaedah Mahkamah 2012. Perayu adalah sebuah syarikat tempatan yang diperbadankan dan terlibat dalam perniagaan pembuatan produk Dyson.

Ia juga menyediakan perkhidmatan penyelidikan, reka bentuk dan pembangunan. Ia juga merupakan orang kena cukai berdaftar di bawah s 20 Akta Cukai Barang dan Perkhidmatan 2014 ('Akta GST'). Perayu menjalankan aktiviti dan perkhidmatan penyelidikan, reka bentuk dan pembangunan ('R&D') untuk produk jenama DYSON secara kontrak kepada syarikat berkaitannya — Dyson Operation Pte Ltd ('DOPL') yang merupakan sebuah syarikat yang diperbadankan dan beroperasi di Singapura. Ini telah dijalankan menurut perjanjian perkhidmatan R&D dan bekalan ('perjanjian R&D') yang dilaksanakan antara kedua-duanya. Selain daripada perkhidmatan R&D yang disediakan oleh perayu kepada DOPL, aktiviti pengilangan barang siap telah dijalankan dengan cara pengeluaran kontrak dan penyumberluaran kepada pengeluar kontrak. Oleh itu, perayu mengeluarkan pelbagai produk Dyson melalui pengeluar kontrak pihak ketiga yang kemudiannya menjual produk Dyson kepada DOPL, yang dikatakan bertindak sebagai prinsipal dengan haknya sendiri. Seterusnya, DOPL, tanpa penglibatan perayu, menjual semula — ini adalah jualan langsung oleh DOPL yang diatur dari Singapura — produk Dyson ini kepada Dyson Exchange Ltd atau Dyson Technology Ltd yang berpangkalan di United Kingdom, yang kemudiannya menjual produk ini kepada pengedar yang terletak di dalam mahupun di luar Malaysia. Oleh kerana jumlah nilai pembekalan bercukai melebihi RM500,000 setiap tahun, DOPL dikehendaki mendaftar untuk GST di bawah s 12 dan 20 Akta GST. Memandangkan DOPL dianggap beroperasi di luar negara, ini seterusnya mencetuskan keperluan untuk DOPL melantik ejen di bawah s 65(6) Akta GST untuk mendaftar bagi tujuan GST. Oleh itu, perayu telah dilantik sebagai ejen bagi pihak DOPL, dan sebagai ejen, perayu bertanggungjawab untuk memenuhi semua tanggungjawab DOPL di bawah Akta GST. Pada 27 Jun 2018, responden memaklumkan perayu bahawa menurut pengauditan yang dijalankan ke atas syarikat perayu dalam tempoh antara 1 April 2015 dan 31 Disember 2017 didapati perayu melanggar s 9 Akta GST, dan menyatakan bahawa 6% GST sepatutnya dikenakan dan dikutip daripada DOPL berkenaan dengan pembekalan perkhidmatan R&D perayu kepada DOPL. Responden, menurut s 43(8) Akta GST mengeluarkan keputusan yang dipersoalkan kepada perayu dalam bentuk bil tuntutan untuk jumlah cukai output GST yang dikatakan diisytiharkan kurang oleh perayu, iaitu sejumlah RM23,932,158.69. Perayu memohon untuk membatalkan keputusan responden tetapi ditolak oleh Mahkamah Tinggi. Oleh itu, rayuan ini.

Diputuskan, membenarkan rayuan:

(1) Statut percukaian seperti Akta GST hendaklah ditafsirkan dengan tegas tanpa sebarang perkataan atau makna yang tersirat. Dan kekaburan, jika ada, mesti ditafsirkan memihak kepada pembayar cukai apabila tiada peruntukan perundangan yang jelas, dalam kes ini, responden tidak boleh menganggap DOPL sebagai orang yang berada di Malaysia di

bawah perintah berkadar sifar semata-mata berdasarkan DOPL telah didaftarkan GST di Malaysia. DOPL termasuk dalam skop s 65(6) Akta GST yang mengarahkan entiti membuat pembekalan bercukai di Malaysia (dengan itu memerlukan pendaftaran di bawah s 20) yang bukan orang yang berada di negara ini untuk mematuhi keperluan untuk melantik ejen. Tiada mana-mana dalam Akta GST menyatakan bahawa hanya kerana orang asing (seperti DOPL) membuat bekalan di Malaysia, ia semestinya menjadi 'berada di Malaysia'. Memandangkan DOPL adalah orang yang bukan berada di Malaysia di bawah s 65(6) Akta GST, ia semestinya diikuti bahawa DOPL juga adalah orang yang bukan berada di Malaysia di bawah perenggan 2(2) perintah berkadar sifar. Penentuan bahawa seseorang seperti DOPL memenuhi ujian untuk tidak berada di Malaysia bagi tujuan s 65(6) dan 65(8) Akta GST, manakala pada masa yang sama diputuskan telah memenuhi ujian yang sama untuk berada di Malaysia bagi tujuan perenggan 2(2) perintah berkadar sifar, yang berkuat kuasa mengakibatkan kesimpulan yang bertentangan secara diametrik di bawah Akta GST dan perintah berkadar sifar itu adalah cacat secara logik dan undang-undang. DOPL 'tidak berada di Malaysia' pada masa perkhidmatan R&D dibekalkan kerana responden juga menganggap DOPL tidak mempunyai perniagaan atau pertubuhan tetap yang memerlukannya melantik ejen di bawah s 65(6) Akta GST; dan responden juga tidak memberikan sebarang bukti bahawa DOPL mempunyai pekerja yang bekerja di Malaysia atau mempunyai pejabat fizikal di Malaysia, pada masa material apabila perkhidmatan R&D diberikan. Oleh itu, status DOPL berdaftar GST atau pelantikan ejennya di bawah s 65(6) Akta GST bukan tanpa lebih menjadikan DOPL sebagai orang 'berada di Malaysia'. DOPL seharusnya juga menjadi orang yang 'bukan berada di Malaysia' untuk tujuan perintah berkadar sifar yang sepatutnya melayakkan perayu untuk GST berkadar sifar ke atas pembekalan perkhidmatan R&Dnya kepada DOPL (lihat perenggan 43, 45, 48, 50, 56 & 58).

(2) Pada pentafsiran sebenar s 65(6) Akta GST, pelantikan perayu sebagai ejen GST tidak menyebabkan DOPL dianggap sebagai orang yang berada di Malaysia, seperti yang didapati secara salah oleh Mahkamah Tinggi, tetapi sebaliknya s 65(6) Akta GST menekankan bahawa perayu dianggap tidak berada di Malaysia berhubungan fungsi agensinya. Kesimpulan hakim Mahkamah Tinggi yang bijaksana bahawa berdasarkan pelantikan perayu sebagai ejen DOPL di bawah s 65(6) Akta GST, perayu ditafsirkan sebagai 'establismen tetap' DOPL di Malaysia, menyebabkan DOPL dianggap berada di Malaysia untuk tujuan perintah berkadar sifar — sekali gus menolak tuntutan perayu untuk GST berkadar sifar berkenaan dengan pembekalan perkhidmatan R&D kepada DOPL — telah dibuat secara silap. Mahkamah Tinggi tidak menafsirkan dengan betul s 65(1) Akta GST dalam berpendapat bahawa

pelantikan perayu di bawah s 65(6) Akta GST bermakna pembekalan perayu dianggap dibuat oleh DOPL di bawah s 65(1) Akta GST, sehingga DOPL telah tersilap dianggap berada di Malaysia pada masa perkhidmatan disediakan. Perkhidmatan R&D yang disediakan oleh perayu kepada DOPL adalah pembekalan berkadar sifar kerana pertama sekali, ia dibekalkan di bawah perjanjian R&D; kedua, DOPL ialah 'orang yang berada di negara selain Malaysia'; dan ketiga perkhidmatan R&D secara langsung memberi manfaat kepada DOPL yang berada di luar Malaysia pada masa perkhidmatan R&D dilaksanakan. Dalam membuat keputusan yang dipersoalkan, responden telah mengambil kira faktor-faktor yang tidak sepatutnya diambil kira dan pada masa yang sama gagal untuk mengambil kira faktor-faktor yang sepatutnya diambil kira. Responden juga tidak mempertimbangkan dengan secukupnya peruntukan nyata Akta GST dan perintah berkadar sifar, prinsip pembinaan statut percukaian yang mantap, dan konsep GST yang difahami secara umum yang berkaitan dengan levi ke atas pembekalan barang atau perkhidmatan yang dibuat dalam bidang kuasa tempatan (lihat perenggan 74, 75, 78 & 84–85).

(3) Keputusan responden mengeluarkan bil tuntutan yang mengenakan 6% GST adalah salah, merupakan kesilapan undang-undang dan menyalahi undang-undang. Bil tuntutan itu dibatalkan melalui perintah certiorari dan keputusan Mahkamah Tinggi telah diketepikan (lihat perenggan 89–90).]

Cases referred to

Cheah Theam Kheng v City Centre Sdn Bhd (in liquidation) and other appeals [2012] 1 MLJ 761, CA (refd)

Council of Civil Service Unions and others v Minister for the Civil Service [1984] 3 All ER 935, HL (refd)

Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers [1991] 1 MLJ 417, SC (refd)

Ketua Pengarah Kastam v Metrogold Commercial Sdn Bhd [2024] 2 MLJ 918; [2024] 2 MLRA 468, CA (refd)

Malaysian Oxygen Bhd v Soh Tong Wah and another appeal [2015] 3 MLJ 730, CA (refd)

NVJ Menon v The Great Eastern Life Assurance Co Ltd [2004] 3 MLJ 38, CA (refd)

Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal [2005] 3 MLJ 97, FC (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)

Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1, FC (refd)

Legislation referred to

Customs Act 1967
Goods and Services Tax (Repeal) Act 2018 ss 3, 4(1)(b)
Goods and Services Tax Act 2014 (repealed by the Goods and Services Tax (Repeal Act) 2018) ss 3(1), 9, 9(1), (2), 12, 12(2), 14, 14(1), (2), 17(4), 20, 20(3), 21, 24, 43, 43(8), 65, 65(1), (3), (6), (7), (8), 124
Rules of Court 2012 O 53
Services Tax (Zero-Rated Supply) Order 2014 paras 2(2), (2)(b)(iii), (3), 3(1), First Schedule, item 12, Second Schedule

Appeal from: *Dyson Manufacturing Sdn Bhd v Ketua Pengarah Kastam, Jabatan Kastam Diraja Malaysia* [2022] MLJU 3223 (High Court, Shah Alam)

Nitin V Nadkarni (with Ivy Ling Yieng Ping and Jay Fong Jia Sheng) (Lee Hishammuddin Allen & Gledhill) for the appellant.
Krishna Priya a/p Veenagopal@Venugopal (Federal Counsel, Attorney General's Chambers) for the respondent.

Mohd Nazlan JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the judgment of the High Court which dismissed the appellant's judicial review application for a certiorari under O 53 of the Rules of Court 2012 ('the RC 2012') to quash the respondent's decision in issuing a bill of demand for the imposition of tax under the Goods and Services Tax Act 2014 ('the GST Act') in respect of the supply of services by the appellant to its related company which is based outside Malaysia.

[2] This appeal concerned the question whether the supply of services by a local taxpayer to its related foreign company which is registered under the GST Act ought to be construed as a zero-rated supply under the GST Act regime where the former is also registered as the agent of the latter under the Act.

[3] Having heard the appeal — which was conducted by way of a remote communication technology via Zoom, examined the appeal records and considered the submissions by parties, we unanimously decided to set aside the decision of the High Court, and therefore allow the appeal, for the reasons which we set out herein.

KEY BACKGROUND FACTS

[4] The appellant is a locally incorporated company and is involved in the business of manufacturing of Dyson products. It also provides research, design and development services. It was also a registered taxable person under s 20 of

A the (now repealed) GST Act, which came into force on 1 April 2015. The GST Act was repealed by the Goods and Services Tax (Repeal) Act 2018 with effect from 1 September 2018.

B **[5]** The respondent — the Director-General of the Royal Malaysian Customs Department ('the DG of Customs') had duly notified the appellant of its registration under s 21 of the GST Act with the Goods and Services Tax reference number (GST Registration No 000561549312).

C **[6]** The appellant undertakes research, design and development ('R&D') activities and services for the *DYSON* brand products on a contract basis to its related company — Dyson Operation Pte Ltd ('DOPL') which is a company incorporated and operating in Singapore. This is carried on pursuant to the R&D services and supply agreement ('the R&D agreement') executed between the two dated 8 November 2012, even before the enactment of the GST Act.

D

[7] Separately, apart from the R&D services provided by the appellant to DOPL, finished goods manufacturing activities are undertaken by way of contract manufacturing and outsourcing to the contract manufacturer who is

E also the licensee of the licensed manufacturing warehouse ('LMW'). The appellant taxpayer therefore manufactures various Dyson products through third party contract manufacturers which then sells the Dyson products to DOPL, which is said to be acting as a principal in its own right. In turn, DOPL, without the involvement of the appellant, resells — this being a direct

F sale by DOPL arranged from Singapore — these Dyson products to Dyson Exchange Ltd ('DEL') or Dyson Technology Ltd ('DTL') based in the United Kingdom, which subsequently sell these products to distributors located both inside and outside Malaysia.

G **[8]** As the total value of the taxable supplies to DEL and DTL exceeded RM500,000 every year, DOPL was required to register for GST under ss 12 (in respect of provisions on place of supply) and 20 (liability to be registered) of the GST Act. Since DOPL was considered to be operating outside the country, this in turn triggered the requirement for DOPL to appoint an agent under s 65(6)

H in order to register for GST purposes.

[9] The appellant was thus appointed as an agent on behalf of the DOPL, and as the agent, the appellant is liable to meet all the responsibilities of DOPL under the GST Act.

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[10] In a letter dated 27 June 2018, the respondent notified the appellant that pursuant to an audit performed on the appellant company during the period between 1 April 2015 and 31 December 2017 it was found that the appellant was in breach of s 9 of the GST Act, and stated that 6% GST should

have been charged and collected from DOPL in respect of the appellant's supply of R&D services to DOPL.

[11] On 8 March 2019, the respondent, pursuant to s 43(8) of the GST Act issued its impugned decision to the appellant in the form of a bill of demand of even date for the taxable periods from 1 April 2015 to 31 December 2017 for the amount of GST output tax which was said to have been under declared by the appellant, which was a total sum of RM23,932,158.69. In addition, separately, penalties at 40% on the under declared tax in respect of the taxable period from 31 January 2017 to 31 October 2017 which represented a sum of RM2,980,649.44 had also been imposed on the appellant.

[12] It is also noted that following the repeal of the GST Act and the GST Appeal Tribunal pursuant to s 3 of the Goods and Services Tax (Repeal) Act 2018, the Customs Appeal Tribunal had ceased to have any jurisdiction to hear any challenges to the bill of demand pursuant to s 43 of the GST Act, which is the subject matter of these proceedings. The appellant's request for a review of the bill of demand under s 124 of the GST Act was refused as a result. This led to the appellant resorting to the instant judicial review application, seeking the main remedy of an order of certiorari to quash the respondent's decision. The appellant did not succeed. The application was refused by the High Court. Hence the instant appeal before us.

ESSENCE OF THE DECISION OF THE HIGH COURT

[13] The key finding of the High Court is that the appellant, being an agent appointed under s 65(6) of the GST Act, is considered to be an agency through which DOPL 'carries on a business' in Malaysia. Accordingly, DOPL is deemed to be 'belonging in Malaysia' under para 2(3) of the Services Tax (Zero-Rated Supply) Order 2014 ('the Zero-Rated Order') and thus, the R&D services supplied by the appellant to DOPL ought rightly to be subjected to 6% GST. In other words, item 12 of the Second Schedule to the Zero-Rated Order, which provides that services supplied by a Malaysian entity — such as the appellant — under a contract to 'a person who belongs in a country other than Malaysia' is a zero-rated supply, is not applicable to the instant case. The learned High Court judge stated the following:

> [30] In the view of this court, the applicant is not eligible to enjoy the treatment under item 12, Second Schedule of the Goods and Services Tax (Zero-Rated Supply) Order 2014. This is because tax treatment for R&D services is not applicable as the R&D services by the applicant to DOPL are standard rate of 6%. The supply of Research and Development ('R&D') services supplied by the applicant to DOPL, in the view of this court, is a taxable supply at a rate of 6% in accordance with s 9 of the GST Act 2014.

[14] The High Court held that DOPL is a person who belongs in Malaysia under the Zero-Rated Order as DOPL has a 'fixed establishment' in Malaysia by reason of the appellant's appointment as its agent. In reliance of s 14(2) of the GST Act and the definition of 'fixed establishment' under the Royal Malaysian Customs Guide on Supply dated 13 February 2017, the High Court ruled that DOPL is deemed to have a fixed establishment in Malaysia through the appellant's appointment, as follows:

> [39] The facts are the DOPL is in Singapore and DOPL's agent is in Malaysia. The applicant is DOPL's agent. The provision in sub-s 14(2) of the GST Act and definition of fixed establishment in the Royal Malaysian Customs Guide on Supply 13 February 2017 are clear.
>
> [40] Therefore, based on sub-s 14(2) of the GST Act and definition of fixed establishment under the Royal Malaysian Customs Guide on Supply dated 13 February 2017, this court is of the considered view that this would translate that DOPL to have a fixed establishment in Malaysia.

[15] As significantly, the High Court also held that since the appellant is the agent of DOPL, the appellant's supply of the R&D services were deemed to be made by DOPL pursuant to s 65(1) of the GST Act, and DOPL was considered to be in Malaysia at the time the services were rendered. The learned High Court judge said this:

> [33] Hence sub-s 65(1) of the GST Act provides that where an agent is acting on behalf of a principal, the supply by the agent is deemed to be made by the principal and not by the agent. In this case the facts reveal that the applicant is the agent of DOPL. Applying sub-s 65(1) of the GST Act to the facts of this case, this would mean that the supply of the applicant is deemed to be done by DOPL.

PRINCIPAL GROUNDS OF APPEAL

[16] As set out in its memorandum of appeal, the appellant highlighted that the learned High Court judge had erred in law and in fact in arriving at the findings which constituted an illegality in the following terms:

(a) in deciding that GST at the standard rate of 6% should be charged by the appellant for the supply of R&D services to DOPL in Singapore;

(b) in holding that item 12 of the Second Schedule to the Zero-Rated Order, as *gazetted* under s 17(4) of the GST Act, is not applicable to the appellant's R&D services;

(c) by failing to appreciate that DOPL as a foreign company could not be treated as belonging in Malaysia by mere virtue of appointing an agent under s 65(6) of the GST Act

(d) by erroneously applying ss 65(1) and 14(2) of the GST Act to the present matter; and

(e) by erroneously applying the respondent's guide on supply dated 13 February 2017, which consists of the respondent's own interpretation and has no force of law, to the present matter.

[17] It was also pleaded by the appellant that the decision of the High Court was tainted with irrationality and unreasonableness given that the respondent's decision amounts to a denial of the appellant's legitimate expectation; that the respondent had exercised its authority arbitrarily and/or mechanically without applying its mind to the facts and circumstances of the appellant; and that the respondent failed to give any valid justification, reason or basis for its decision to issue the bill of demand.

ESSENCE OF THE RIVAL CONTENTIONS OF THE LITIGANTS

[18] The principal position of the appellant is that no GST was chargeable — in the sense that zero rated GST should apply — in respect of services provided by a Malaysian entity, such as the appellant vis a vis the R&D services, to 'a person who belongs in a country other than Malaysia' under item 12 of the Second Schedule to the Zero-Rated Order.

[19] For DOPL to be GST registered through the appointment of an agent — in this case, the appellant — under s 65(6) of the GST Act, DOPL has to first be 'a person shall be treated as not belonging in Malaysia' under s 65(8) of the GST Act. Thus, if DOPL belonged in Malaysia, no agent should be appointed under s 65(6) in the first place.

[20] The respondent, on the other hand, maintained that the appellant is not eligible to enjoy treatment under item 12 of the Second Schedule to the Zero-Rated Order since the supply of the R&D services by the appellant to DOPL is a taxable supply chargeable at a rate of 6% in accordance with s 9 of the GST Act. The appellant is an agent on behalf of DOPL who is liable to fulfill all responsibilities of DOPL under the GST Act.

[21] It was thus submitted by the respondent that for the supply by the appellant of services made to DOPL — which is a company operating outside Malaysia but is a GST registered person in Malaysia — the appellant is not eligible for zero-rated GST.

ANALYSIS AND FINDINGS OF THIS COURT

[22] The central issue for determination in this appeal is whether GST should have been charged on the R&D services supplied by the appellant to DOPL. We must emphasise that this case is not concerned with the GST-implications of the goods sold by DOPL in Malaysia, and which is not in

dispute. By refusing the judicial review, the High Court, for all intents and purposes accepted the respondent's position that essentially DOPL is deemed to be undertaking business in Malaysia, and that this is predicated primarily on the fact that DOPL is GST — registered and that the appellant is appointed as its agent under s 65(6) of the GST Act.

[23] We should also state at the outset that the issuance of the bill of demand under s 43(8) of the now-repealed GST Act against the appellant in this case does not raise any concern of illegality. This is because although the GST Act has been repealed, liability to GST incurred under the repealed GST Act would still continue as provided under s 4(1)(b) of the Goods and Services Tax (Repeal) Act 2018 as if the repealed Act had not been repealed (see also *Ketua Pengarah Kastam v Metrogold Commercial Sdn Bhd* [2024] 2 MLJ 918; [2024] 2 MLRA 468).

[24] It is fairly well understood that the GST, or in some countries known as Value Added Tax ('VAT'), is a type of tax levied on importation of goods into the country, as well as most goods sold and services supplied for domestic consumption. It is essentially paid by consumers and remitted to the Government by the businesses selling the goods and supplying the services (see further, for example, the decision of this court in *Ketua Pengarah Kastam v Metrogold Commercial Sdn Bhd* [2024] 2 MLJ 918; [2024] 2 MLRA 468).

[25] More definitively, the charging provision — s 9(1) of the GST Act essentially provides that it is a tax to be charged and levied on firstly, any supply of goods or services made in Malaysia, including anything treated as a supply under the GST Act; and secondly, any importation of goods into Malaysia. In simpler and more general terms, in order to determine chargeability to GST, the question in the instant appeal is whether under the law, the supply of the R&D services by the appellant to Singapore based DOPL is one made within or outside the country.

[26] Section 17(4) of the GST Act however, empowers the Minister of Finance to zero-rate the supply of any goods or services in Malaysia. This, the Minister had done, by, as required, making an order published in the *gazette*, determining the supply of goods or services in Malaysia to be a zero-rated supply. There are two categories of taxable supplies — namely standard-rated supplies and zero-rated supplies. Standard-rated supplies are taxable supplies of goods or services which are subject to GST at 6%. Zero-rated supplies are taxable supplies of goods or services which are subject to GST at a zero rate, or 0%.

[27] Hence, the Zero-Rated Order, which in para 3(1) states: 'The supply of goods specified in the First Schedule and the supply of services specified in the

Second Schedule are determined as zero-rated supply'. For present purposes, item 12 of the Second Schedule, in turn, provides that:

> Services supplied under a contract with a person who belongs in a country other than Malaysia and which directly benefit a person who belongs in a country other than Malaysia who is outside Malaysia at the time the services are performed ...

[28] The case of the appellant is that its supply of the R&D services would qualify for zero-rating under item 12 of the Second Schedule to the Zero-Rated Order since the R&D services are supplied; firstly, under a contract with a person — in this case DOPL (by way of the R&D agreement) — who belongs in a country other than Malaysia; secondly, the services of which directly benefit a person (DOPL) who belongs in a country other than Malaysia; and thirdly, DOPL was outside Malaysia at the time the services was performed. In other words, the appellant submitted that per item 12, crucially, no GST should be chargeable in respect of services provided to 'a person who belongs in a country other than Malaysia', which, according to the appellant is the true status with regard to DOPL.

[29] The key phrase 'belonging in a country' is further defined in para 2(2) of the Zero-Rated Order which sets out the test for determining whether a person is considered belonging in a country. Paragraph 2(2) states the following:

> (2) For the purpose of this Order, a person shall be treated as belonging in a country if —
>
> (a) he has his usual place of residence in that country where the supply is made to him as an individual and received by him otherwise than for the purpose of any business carried out by him; and
>
> (b) in the case where paragraph (a) does not apply —
>
> (i) he has in that country a business establishment or fixed establishment and no such establishment elsewhere;
>
> (ii) he has no business establishment or fixed establishment in any country but his usual place of residence is in that country; or
>
> (iii) he has business establishments or fixed establishments both in that country and elsewhere and his establishment which is most directly concerned with the supply is in that country.

[30] And para 2(3) says this:

> (3) For the purposes of subparagraph (2), *a fixed establishment in any country includes a branch or an agency through which a person carries on a business in that country*. (Emphasis added.)

[31] From a careful reading of the above provisions, it will be readily appreciated for the purposes of this appeal is that a key requirement of item 12 of the Second Schedule to the Zero-Rated Order (other than, as stated earlier, the conditions that there is a supply of the services which directly benefit the recipient who belongs in a country other than Malaysia and was outside Malaysia at the time the supply was made) is that GST should be zero-rated if the supply by the appellant is made to an entity who 'belongs in a country other than Malaysia'. Paragraph 2(2) states that an entity belongs in a country if it has a fixed or business establishment or a place of residence in that country, and more importantly for present purposes, a fixed establishment in any country includes an agency through which the entity carries on a business in that country (para 2(3) of the Zero-Rated Order).

[32] This appeal before us therefore turns on the determination of the one principal question of whether, as the learned High Court judge had found, the appellant taxpayer was the 'fixed establishment' of a Singaporean company, namely DOPL, in Malaysia. Based on the above provisions, it is plain that the answer to this question is whether the appellant is an agency through which DOPL carries on a business in Malaysia within the meaning of para 2(3) of the Zero-Rated Order.

[33] Of significant relevance is the fact, mentioned earlier, that DOPL is registered under the GST Act. Here the appellant has been appointed under s 65(6) as an agent on behalf of the DOPL (principal), who is liable to fulfill all responsibilities under the GST Act. The responsibilities include the charging of and collecting GST from customers, filing GST returns, and paying GST to the DG of Customs when total output tax exceeds total input tax.

Whether the GST-registered status of DOPL or the appointment of the appellant as its agent makes DOPL a person who belongs in Malaysia

[34] Now, a key finding of the High Court, accepting the position of the respondent is that although DOPL is a company operating in Singapore, the appellant is providing services to DOPL which is considered a person whose location is in Malaysia given DOPL's status as a registered person under s 20 of the GST Act, such that item 12 of the Second Schedule is not applicable. Therefore, the R&D services carried out and supplied by the appellant to DOPL are charged at the GST standard rate of 6%.

[35] The respondent further emphasised that DOPL was in Malaysia at the time the services were provided because DOPL is a registered person under ss 20 and 21 of the GST Act, having fulfilled the requirement of making taxable supply in Malaysia under s 3(1) of the GST Act. Pursuant to s 12(2) of the GST Act, DOPL is deemed to have made a supply in Malaysia because the sales

transaction involves a transfer from one place in Malaysia to another place in Malaysia. Sale and purchase transactions entered into by DOPL also fulfills the meaning of 'business' under s 3(1), such that DOPL is subject to ss 9 and 20 of the GST Act. As stated earlier, the scope of s 9(2) of the GST Act covers any supply of goods or services made in Malaysia if it is a taxable supply made by a taxable person in the course of business or the continuation of any business carried on by him.

[36] This is how the learned High Court judge made the relevant finding:

> [28] The facts in this case is that the applicant was appointed the agent of DOPL. DOPL is a foreign company which is registered as GST person under s 65(6) of the GST Act. The applicant is the agent of DOPL who has been registered in Malaysia. The R&D services carried out by the applicant to DOPL are at a standard rate of 6%. item 12, Goods and Services Tax (Zero-Rated Supply) Order 2014 PU(A) 272 is not applicable.

[37] It therefore appears that the important issue of whether DOPL has a fixed establishment in this country or more specifically whether it is a person belonging in Malaysia was answered by the High Court in the positive by virtue of the fact that DOPL is in fact GST registered. We have several observations to make on this finding.

[38] First, it must be recalled that DOPL was required to register under s 20 of the GST Act because it was not denied that DOPL makes taxable supply into Malaysia, and that because it is not a person who belongs in the country, adherence must be had to s 65(6) of the GST Act. Indeed, s 65(6) requiring appointment of an agent is triggered precisely because DOPL is not a person belonging in Malaysia in the first place. Section 65(6) reads as follows:

> (6) Where a person who does not belong in Malaysia makes a taxable supply in Malaysia and is liable to be registered under section 20 or intends to be registered under section 24, he shall appoint an agent to act on his behalf and such agent, whether or not he is a taxable person, shall be liable for the tax and comply with any other requirements imposed under this Act as if the agent is a person who does not belong in Malaysia.

[39] Secondly, it is plain that there is no provision in the GST Act or the Zero-Rated Order which supports the finding that DOPL's status could automatically transform from a person 'who does not belong in Malaysia' (thus having to appoint an agent under s 65(6)), to a person 'who belongs in Malaysia' upon being GST-registered under s 20, or on the appointment of an agent under s 65(6). None has been highlighted by the respondent in its submissions either.

[40] Thirdly, as a matter of fact and law, the very language of s 65(6) of the

GST Act clearly states the opposite to the conclusion arrived at by the High Court. For emphasis, we repeat that s 65(6) states that the agent (the appellant) to be appointed under s 65(6) by the person who does not belong in Malaysia (DOPL) must comply with the relevant requirements of the GST Act 'as if the agent is a person who does not belong in Malaysia'. In other words, the appointment of the appellant taxpayer as an GST agent means that the appellant is deemed not to belong in Malaysia, in respect of its agency functions vis a vis the context of the provision. Section 65(6) does not have the effect of saying that DOPL (who, before registration was a person who does not belong in Malaysia) is as a result of the appointment of the agent, to be considered as a person who does belong in Malaysia.

[41] Of interest is to note that the following provision, as found in s 65(7) of the GST Act further confirms that upon the appointment of the agent under s 65(6), the status of the principal — namely the person who does not belong in Malaysia (DOPL), remains unchanged:

> (7) Where an agent has been appointed under subsection (6), the Director General may, with reasonable cause, direct the person who does not belong in Malaysia, by giving a notice in writing to appoint another agent to act on his behalf.

[42] Fourthly, regard must be had to the well-entrenched rules concerning the interpretation of taxing statutes. We can in this regard do no better than reproduce the relevant passages from the judgment of this court in *Metrogold*, as follows:

> [102] Failure to apply the provisions of the laws aside, this additionally, unmistakably runs contrary to the well-entrenched rules on statutory interpretation, especially tax statutes. We restate them here to show how they have not been properly observed.
>
> [103] In the first place, a taxing statute ought to be read strictly without reading or implying into it any spirit, intendment or any equities. Only the express words as so legislated matter. In *National Land Finance Cooperative Society Limited v Director General Inland Revenue* [1994] 1 MLJ 99 Gunn Chit Tuan CJ (Malaya), for the Supreme Court stated as follows:
>
> > There are ample authorities to show that courts have refused to adopt a construction of a taxing Act which would impose liability when doubt exists. *In Re Micklewait it was held that a subject was not to be taxed without clear words*. We realize that revenue from taxation is essential to enable the Government to administer the country and that the courts should help in the collection of taxes whilst remaining fair to taxpayers. Nevertheless, we should remind ourselves of the principle of strict interpretation as stated by Rowlatt J in *Cape Brandy Syndicate v Inland Revenue Commissioners*:
> >
> > > *... in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One*

can only look fairly at the language used ...

It has also been said by the Judicial Committee in *Oriental Bank Corp v Wright 10* 'that the intention to impose a charge upon a subject must be shown by clear and unambiguous language. (Emphasis added.)

[104] Secondly, related to the first is that as stated by the Supreme Court in *NKM Holdings Sdn Bhd v Pan Malaysia Wood Bhd* [1987] 1 MLJ 39 the duty of the court, and its only duty, is to expound the language of the statute in accordance with the settled rules of construction. The court has nothing to do with the policy of any Act which it may be called upon to interpret.

[105] Thirdly, any ambiguity in tax statutes ought to be resolved in a construction that favours the taxpayer. This was made clear by the Court of Appeal in *Exxon Chemical (M) Sdn Bhd v Ketua Pengarah Dalam Negeri* [2006] 1 MLJ 428 which followed *National Land Finance*. Gopal Sri Ram JCA (as he then was) affirmed such interpretation in the following terms:

[10] In the third place, the principle that a provision in a taxing statute must be read strictly is one that is to be applied against revenue and not in its favour. The maxim in revenue law is this: no clear provision; no tax. If there is any doubt then it must be resolved in the taxpayer's favour (see *National Land Finance Co-operative Society Ltd v Director General of Inland Revenue* [1994] 1 MLJ 99). The corollary of that proposition is that those parts in a revenue statute that favour the taxpayer must be read liberally. What learned counsel for revenue is asking us to do is to go the other way. That would be standing the true principle on its head.

[106] Fourthly, a tax statute ought not to be interpreted in a fashion that would result in absurdity or injustice. In *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97 the Federal Court held that whilst Parliament via s 17A of the Interpretation Acts 1948 and 1967 requires the court to adopt a purposive approach, and this includes in respect of a taxing statute, the court is under a duty to adopt an approach that produces neither injustice nor absurdity, but one that promotes the purpose or object underlying the particular statute. *Palm Oil Research* is also an authority for the other trite principle that a subsidiary legislation cannot conflict with the parent statute.

[107] Fifthly, specific words which appear in different provisions of a legislation must be consistently interpreted and applied in the same sense. An important corollary to this is that a statutory provision cannot be interpreted in such a way to negate the effect of another provision of the same statute (see *Cheow Keok v Public Prosecutor* [1940] 9 MLJ 103).

[43] Applying these rules, we cannot disagree with the submission of the appellant that taxing statute such as the GST Act should be strictly interpreted with no words or meaning to be implied. And that ambiguity, if any, must be construed in favour of the taxpayer such that absent clear legislative provision,

in this case, the respondent cannot deem DOPL as a person belonging in Malaysia under the Zero-Rated Order purely on the basis that DOPL is GST registered in Malaysia.

[44] It is clear and we reiterate, as stated above, that s 65(6) of the GST Act requires a person 'not belonging in Malaysia' but who makes taxable supplies in Malaysia and who is required to registered for GST, to appoint an agent to fulfil its GST obligations under the GST Act. Now, importantly, s 65(8) sets out the test for determining whether a person is considered as 'not belonging in Malaysia', as follows:

> (8) For the purposes of subsection (6), a person shall be treated as not belonging in Malaysia if —
>
> (a) he has no business establishment or other fixed establishment in Malaysia;
>
> (b) he has no business establishment or other fixed establishment in any country and his usual place of residence is not in Malaysia; or
>
> (c) he has a business establishment or other fixed establishment both in Malaysia and elsewhere and his establishment which is most directly concerned with the supply is not in Malaysia,
>
> and for the purposes of paragraphs (a), (b) and (c), *a fixed establishment in Malaysia or in any other country includes a branch or an agency through which a person carries on a business in Malaysia* or in that other country, as the case may be. (Emphasis added.)

[45] It is important to state that evidence shows that the respondent had previously accepted that DOPL was considered as a person who does not belong in Malaysia. This is evident from the DG of Customs' approval of the appointment of the appellant dated 19 March 2015 as the agent of DOPL pursuant to s 65(6) of the GST Act. This means that the respondent must have also agreed that DOPL fell within the scope of s 65(6) which compels the entity making taxable supplies in Malaysia (thus requiring registration under s 20) who is not a person who belongs in this country to comply with the requirement to appoint an agent. We cannot emphasise enough that nowhere in the GST Act does it state that just because a foreign person (such as DOPL) makes supplies in Malaysia it must necessarily be one 'belonging in Malaysia'. Doubtless, it must register under s 20. It must also appoint an agent under s 65(6) (precisely because it is 'not belonging in Malaysia'). But that without more does not automatically mean it ceases to be 'not belonging in Malaysia'.

[46] As such, reverting to the principal issue in this case on whether GST is chargeable for the supply of the R&D services, we have earlier stated that this depends on the key phrase 'belongs in a country other than Malaysia' as defined in paras 2(2) and 2(3) of the Zero-Rated Order which, as set out above, also like

s 65(8), state the same test for determining whether a person is considered belonging in a country.

[47] It is therefore unmistakable and worthy of emphasis that the provisions in paras 2(2) and 2(3) of the Zero-Rated Order are identical to the language on the very same test of a person who belongs in the country as found in s 65(8) of the GST Act. As stated earlier, para 2(2) starts with 'For the purpose of this Order, a person shall be treated as belonging in a country if ...' whilst s 65(8) of the GST Act states that 'For the purposes of subsection (6), a person shall be treated as not belonging in Malaysia if ...'. The only difference, which in any event makes no real difference between the two provisions, is that the former is expressed in a positive manner whilst the latter, in the negative. Otherwise, the contents are identical.

[48] Taking into consideration the trite rules of construction of taxing statute as stated earlier, and also in light of the rule that subsidiary legislation, such as in this case the Zero-Rated Order, cannot conflict with the parent statute, which is the GST Act (see *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97) we are of the view that given our finding that DOPL is a person *not belonging in Malaysia* under s 65(6) of the GST Act, it must necessarily follow that DOPL is also a person who is *not belonging in Malaysia* under para 2(2) of the Zero-Rated Order.

[49] We further agree with the appellant that there is no evidence of any change in facts or circumstances after the appointment of the appellant as the agent on 25 November 2014 under s 65(6) of the GST Act that would result in DOPL ceasing to be a person 'not belonging in Malaysia'. The R&D services continue to be supplied by the appellant as before. Neither is there even a suggestion by the respondent that DOPL had any physical presence or offices in Malaysia after that date. Even if the appointment of the agent somehow converted DOPL into a person belonging in Malaysia (which is not the case), DOPL would then immediately need to revoke the appointment of the appellant because a person belonging in Malaysia is not required to appoint an agent under s 65(6) of the GST Act. The all-important question requires a simple yes or no answer. The person in question, DOPL in this case either has a business or fixed establishment in Malaysia or it does not. Or that it either carries on business through an agent in Malaysia or it does not.

[50] Accordingly, as these pertinent provisions are in *pari materia*, we find that the determination that a person such as DOPL met the test for not belonging in Malaysia for the purposes of ss 65(6) and 65(8) of the GST Act, while at the same time held to have met the same test for belonging in Malaysia for the purposes of para 2(2) of the Zero-Rated Order, in effect resulting in

diametrically opposite conclusions under the GST Act and the Zero-Rated Order to be both logically and legally flawed.

[51] Such irreconcilable contradiction also represents a form of approbation and reprobation on the part of the respondent, which the law does not countenance. Regard may usefully be made to the decision of this court in the case of *Cheah Theam Kheng v City Centre Sdn Bhd (in liquidation) and other appeals* [2012] 1 MLJ 761 which stated as follows:

> We categorically say that the liquidator cannot blow hot and cold to suit him whenever he feels like it. He cannot approbate and reprobate in the same breath. On the one hand, he claims that the High Court order dated 26 July 2001 overrides or displaces a stature which render the said order invalid and yet he has the audacity to continue to act as a liquidator by virtue of the said order. In the words of Sir Nicolas Browne-Wilkinson VC in *Express Newspapers plc v News (UK) Ltd and others* [1990] 3 All ER 376, at pp 383–384:
>
> > There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitudes towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance.

[52] The respondent further insisted that DOPL must be a person whose place is in Malaysia by reason of the fact that it makes taxable supplies in Malaysia. We reiterate that this is obviously inaccurate since the provision of s 65(6) of the GST Act plainly acknowledges that a foreign entity 'not belonging in Malaysia' could be making taxable supplies in Malaysia, which is the reason why the provision is enacted for such foreign entity to appoint an agent to meet its GST obligations in this country.

[53] It was also asserted, similar to a previous argument, that DOPL was in Malaysia at the time the R&D services were supplied since DOPL was GST registered under ss 20 and 24 of the GST Act, and that GST registration applies to persons in Malaysia only, and persons outside of Malaysia cannot be registered under GST.

[54] This we repeat is manifestly inaccurate since a person can certainly be registered even if it is a foreign company (like DOPL) if it makes a supply in Malaysia (again, like DOPL) within the remit of s 20. But as we have stated, this does not automatically mean it is a 'person belonging in Malaysia'. Importantly, it must be pointed out that the requirement to be GST registered under s 20(3) of the GST Act is predicated on whether the total value of DOPL's taxable supplies in Malaysia exceeded the prescribed threshold of RM500,000pa (see the Goods and Services Tax (Amount of Taxable Supply)

Order 2014). There is no requirement in this provision as posited by the respondent that the person making the taxable supplies must be in Malaysia.

[55] We therefore say that the R&D services should qualify for zero-rating under item 12 of the Second Schedule to the Zero-Rated Order since the same are supplied in satisfaction of the criteria set out in item 12 which we repeat are:

(a) under a contract with a person who belongs in a country other than Malaysia — (evidence of the R&D agreement);

(b) which directly benefit a person who belongs in a country other than Malaysia (DOPL operates in Singapore); and

(c) is outside Malaysia at the time the service is performed (no evidence DOPL was in Malaysia at the time).

[56] We must add for further emphasis that DOPL was 'not belonging in Malaysia' at the time the R&D services were supplied because even the respondent averred that DOPL did not have a business or fixed establishment which required it to appoint an agent under s 65(6) and neither did the respondent furnish any proof that DOPL had employees working in Malaysia or had a physical office in Malaysia, at the material time when the R&D services were rendered.

[57] There is after all no legal necessity for DOPL to have any physical establishment or business premise in Malaysia. It is tax resident in Singapore; its central management is in Singapore; and it has no office or other physical presence in Malaysia. All supplies and acquisitions of DOPL are managed and executed from its office in Singapore, without any involvement of the appellant. There is no evidence to the contrary. Instead, evidence demonstrates that the appellant and DOPL operate as separate and distinct businesses. Support for this may also be found in the supplementary affidavit affirmed on 19 April 2021 by Chen Weixuan Rachael, Regional Head of Tax of DOPL which states that any sales of Dyson products to DEL and DTL are managed and executed directly by DOPL from its office in Singapore.

[58] As such, on the facts and circumstances of this case, we find that the GST registered status of DOPL or its appointment of an agent under s 65(6) does not without more render DOPL to be a person 'belonging in Malaysia'. DOPL should as such also be a person 'not belonging in Malaysia' for the purposes of the Zero-Rated Order that ought therefore to have qualified the appellant for a zero-rated GST on its supply of R&D services to DOPL.

Whether the appellant taxpayer's appointment created a 'Fixed Establishment' for DOPL in Malaysia in the form of an agency through which DOPL carries on business, and hence became a person belonging in Malaysia

[59] The one other primary reason adopted by the respondent in rejecting the appellant's claim for zero-rated GST for its R&D services is the related finding that the appointment of the appellant as GST agent under s 65(6) transformed DOPL into a person who belongs in Malaysia. This is a more specific determination that the appointment created a 'Fixed Establishment' for DOPL in Malaysia in the form of an agency through which DOPL carries on business, and hence DOPL became a person belonging in Malaysia. This is the test stated in para 2(3) of the Zero-Rated Order and s 65(8) of the GST Act to determine whether the presence of an agent could be deemed to be the business or fixed establishment of a foreign company such as DOPL such that the foreign company could be treated as one belonging in the country after all, and attracts the applicable GST implications.

[60] It will immediately be appreciated that this position is untenable given the specific mention in s 65(6) itself that, for the purposes of performing its duties as agent under s 65(6), the appellant taxpayer is deemed to be 'a person who does not belong in Malaysia'. For emphasis, we set out again the entirety of s 65(6), as follows:

> (6) Where a person who does not belong in Malaysia makes a taxable supply in Malaysia and is liable to be registered under section 20 or intends to be registered under section 24, he shall appoint an agent to act on his behalf and such agent, whether or not he is a taxable person, shall be liable for the tax and comply with any other requirements imposed under this Act *as if the agent is a person who does not belong in Malaysia*. (Emphasis added.)

[61] More importantly, the respondent claimed that DOPL is deemed to have a 'fixed establishment' in Malaysia for the reasons that firstly, DOPL had appointed the appellant as 'an agent to act on his behalf' and to pay any GST payable on its behalf under s 65(6) of the GST Act secondly, the appellant taxpayer is construed to be making taxable supplies in Malaysia on DOPL's behalf under s 65(1) of the GST Act and thirdly, by extension, the appellant is deemed to function as DOPL's 'agency through which [it] carries on business' in Malaysia under para 2(3) of the Zero-Rated Order.

[62] This was accepted by the High Court which discussed the point as follows:

> [33] Hence sub-s 65(1) of the GST Act provides that where an agent is acting on behalf of a principal, the supply by the agent is deemed to be made by the principal and not by the agent. In this case the facts reveal that the applicant is the agent of DOPL. Applying sub-s 65(1) of the GST Act to the facts of this case, this would mean that the supply of the applicant is deemed to be done by DOPL.
>
> [34] Therefore, as the supply of the applicant is deemed to be done by DOPL, it could be considered that DOPL was in Malaysia at the time the services were provided as a registered person under s 20 of the GST Act 2014. Moreover, DOPL

is a foreign company that has been registered (GST Registration No 000859230208) in Malaysia in accordance with the requirements of s 65 (6) of the Goods and Services Act.

[35] As the GST registration applies to persons in Malaysia, DOPL appointed the applicant as an agent in Malaysia, to act on its behalf.

[63] A careful scrutiny of the relevant provisions will show that this stance of the respondent, affirmed by the High Court, is unsustainable. Firstly, the appointment of the appellant as the agent of DOPL under s 65(6) does not under the law authorised the appellant to transact on DOPL's behalf in Malaysia. It must be highlighted that the authority for the appellant taxpayer under s 65(6) is only to be responsible for GST on behalf of DOPL, and to comply with the requirements under the GST Act, 'as if the agent is a person who does not belong in Malaysia'. Thus, for the purposes of performing its duties as an agent under s 65(6), the appellant taxpayer is deemed to be 'a person who does not belong in Malaysia'. Crystal clearly, this puts paid to the respondent's primary contention that the mere appointment of the appellant as the GST agent for DOPL converted DOPL into a person who belongs in Malaysia. Since the law in s 65(6) itself deems that the agent does not belong in Malaysia, it is not possible to hold DOPL as one that is belonging in Malaysia through that agent.

[64] Moreover, reference may be helpfully made to the Explanatory Note of the Goods and Services Tax Bill 2014, specifically cl 65 which explains the responsibility of an agent such as the appellant herein, appointed under s 65(6) of the GST Act, as follows:

... This clause also seeks to require a principal who does not belong in Malaysia but would be a taxable person if he belongs in Malaysia to appoint an agent whether or not the agent is a taxable person, *to account for tax on his behalf*. However, the Director General can direct the principal who does not belong in Malaysia to appoint another agent to act on his behalf ... This clause provides for the scope where a person is treated as not belonging in Malaysia .... (Emphasis added.)

[65] Also, pursuant to the appellant's letter of appointment of 25 November 2014, the appellant is expressly stated only to handle GST matters. Nowhere in the letter of appointment or elsewhere is it stated that the appellant is appointed as an agent to arrange for the supply of goods and service for the principal's customers or clients, or through which the appellant taxpayer could transact business on behalf of DOPL.

[66] Despite the finding of the High Court that the supply of the R&D services by the appellant was deemed to be done by DOPL, there is crucially absolutely nothing in s 65 or anywhere in the GST Act, which provides that the appointment of the appellant as DOPL's GST agent means that the taxpayer's

A own supply of the R&D services to DOPL is consequently deemed to be made on behalf of DOPL; or even that the appellant taxpayer is deemed to 'carry on business' on behalf of DOPL in Malaysia.

B **[67]** Secondly, notwithstanding the respondent's contention and the High Court's finding that where an agent is acting on behalf of a principal, the supply by the agent is deemed pursuant s 65(1) of the GST Act to be made by the principal, and not by the agent, we emphasise that the words of s 65(1) of the GST Act must be properly understood. It states as follows:

C (1) Where goods or services are supplied by an agent acting on behalf of a principal, the supply shall be deemed to be made by the principal and not by the agent.

[68] We must state the obvious that s 65(1) provides that it can only be invoked when the appellant taxpayer, as the agent, actually makes a supply on behalf of DOPL (its principal). The supply is deemed to be made by the principal and not by the agent only if the goods or services (such as the R&D services) are supplied by the agent acting on behalf of a principal (DOPL). There must be goods or services supplied by the agent to a third party *on behalf of* DOPL for s 65(1) to be applicable.

[69] Section 65(1) is manifestly irrelevant to the present case. Instead, given the facts of this case, and we are referring to the R&D services supplied by the appellant, the relevant provision applicable here is s 65(3) of the GST Act which states that where a service is supplied through an agent acting in his own name, the supply shall be treated as a supply by the agent. It reads:

(3) Where goods or services are supplied through an agent acting in his own name, the supply shall be treated as a supply to the agent and as a supply by the agent.

[70] It is of interest to note that as correctly submitted by the appellant, the respondent did not actually identify what supply the appellant taxpayer, as agent, is making on behalf of DOPL. In this connection, we must reiterate that this appeal is concerned solely with the issue of whether the R&D services supplied by the appellant taxpayer to DOPL is a zero-rated supply pursuant to item 12 of the Second Schedule to the Zero-Rated Order. This appeal is definitely not about the liability to GST of any goods and services supplied by DOPL to Malaysian entities.

[71] It is clear to us that the R&D services were supplied by the appellant in its own capacity, and not in the capacity as DOPL's agent. Significantly, the relevant contract between the appellant and DOPL — the R&D agreement — which was executed on 8 November 2012 well before the GST Act came into effect on 1 April 2015 plainly stated in its recital and cl 2 that the appellant is

providing the R&D services to DOPL as the service recipient; and for DOPL to make payment to the appellant for the R&D services under cl 9.2.

[72] There is, we reiterate, additionally nothing that gives the appellant the authority to enter into any business transaction on behalf of DOPL. And as averred by the appellant, consistent with the letter of appointment and the provisions of the GST Act, as an agent appointed under s 65(6), it has no power to enter into any business arrangement or transaction on behalf of DOPL, which the respondent did not dispute in affidavit. We repeat that we are satisfied that there is no evidence that the appellant taxpayer had actually supplied goods and services as agent for DOPL to DOPL's customers or carried on business on DOPL's behalf in Malaysia. Indeed, the appellant, as an agent under s 65(6) is neither competent nor authorised to do so.

[73] Thus, under no circumstance of this case can it be stated that DOPL is both the service provider and service recipient of the R&D services at the same time. Otherwise, if the R&D services were deemed provided by DOPL, then the inescapable inference must be that the R&D services were deemed supplied by DOPL *to itself* — which would offend the rule against constructing statute in a fashion that would result in an absurdity. Thus s 65(1) of the GST Act, much relied on by the respondent, is only applicable to a supply provided by an agent on behalf of a principal. It has no application to the facts of the instant case because the R&D services were not provided by the appellant as an agent on behalf of DOPL.

[74] In the final analysis, in our view, on a true construction of s 65(6) of the GST Act, the appointment of the appellant taxpayer as a GST agent does not result in DOPL being considered to be a person belonging in Malaysia, as incorrectly found by the High Court, but that instead s 65(6) highlights that the appellant is deemed not to belong in Malaysia vis a vis its agency functions.

[75] As such, it is our judgment that the conclusion of the learned High Court judge that by virtue of the appellant's appointment as DOPL's agent under s 65(6) of the GST Act, the appellant is construed as DOPL's 'fixed establishment' in Malaysia, resulting in DOPL being considered to be belonging in Malaysia for the purposes of the Zero-Rated Order — thus refusing the claim of the appellant for zero-rated GST in respect of the supply of R&D services to DOPL — to have been made in error. We are also of the view that the High Court had not correctly construed s 65(1) of the GST Act in holding that the appellant taxpayer's appointment under s 65(6) meant that the appellant's supplies are deemed to be made by DOPL under s 65(1), such that DOPL is erroneously considered to be in Malaysia at the time the services were provided.

[76] We further agree with the submission of the appellant that even if assuming DOPL were deemed to have *fixed establishment* in both Singapore and Malaysia (with the appellant as DOPL's fixed establishment), there is still the need to meet the second criterion of the test under aforementioned para 2(2)(b)(iii) of the Zero-Rated Order, which is whether DOPL's establishment which is most directly concerned with DOPL's supplies is in Malaysia (in order to attract standard rate GST).

[77] As such, the analysis by the High Court which found that DOPL as belonging in Malaysia under the Zero-Rated Order by reason that DOPL has a fixed establishment in Malaysia is therefore one made without considering the entirety of the provision in para 2(2)(b)(iii). This is significant since the appellant's case is that DOPL's establishment which is most directly concerned with its supply is in Singapore, not Malaysia.

[78] The making of taxable supplies of the Dyson products in Malaysia by DOPL does not necessarily mean that the supplier, such as DOPL must belong in Malaysia. That much is clear based on s 65(6). And applying item 12 of the Second Schedule to the Zero-Rated Order, we again hold that the R&D services provided by the appellant to DOPL is a zero-rated supply because firstly, it is supplied under the R&D agreement; secondly, as discussed earlier, DOPL is a 'person who belongs in a country other than Malaysia'; and thirdly the R&D services directly benefitted DOPL who was outside Malaysia at the time the R&D services were performed. Further, fourthly, even if the appellant constituted DOPL's fixed establishment in Malaysia (which we found not to be the case), given that DOPL undoubtedly operates in Singapore and could also therefore be expected to have a fixed or business establishment in the Republic, there was nonetheless no determination or evidence referred to by the respondent or the High Court that the 'fixed establishment' that is 'most directly concerned with' the DOPL's supply is in fact in Malaysia, as compared to Singapore, within the meaning of para 2(2)(b)(iii) of the Second Schedule to the Zero-Rated Order.

[79] As for other issues, apart from the respondent, as did the High Court, inaccurately in the context, having regard to s 14(2) of the GST Act (but omitted reference to s 14(1) which clearly states that s 14 is only applicable to the determination of the place of belonging of a *supplier* of services such as the appellant taxpayer, and not that of a service recipient such as DOPL), the respondent also applied the definition of 'fixed establishment' under the Royal Malaysian Customs Guide on Supply dated 13 February 2017 (which has no force of law) which led to the conclusion that DOPL is deemed to have a fixed establishment in Malaysia through the appellant's appointment as the agent.

[80] We need only mention for emphasis that the construction of not only statutes, but also of written documents, such as the said Royal Malaysian Customs Guide on Supply and the aforementioned letter of appointment is a question of law for determination by the court, such that even witness evidence is irrelevant (see the Court of Appeal decision in *NVJ Menon v The Great Eastern Life Assurance Co Ltd* [2004] 3 MLJ 38).

[81] The other issue with the stance of the respondent concerns the claim that the appellant had, following the audit by the respondent, failed to produce documentary proof, specifically in the form of the export declaration form ('K2 Form') in order to prove export. The High Court too mentioned this, as follows:

> [47] The facts before this court demonstrate that the bill of demand was issued after an audit was undertaken. There was a failure on the part of the applicant to provide proof of documents (Borang Kastam 2). Hence, it is the considered view of this court that the respondent had taken into account the facts and circumstances of the applicant. It cannot be said that the respondent had exercised its authority arbitrarily.

[82] We would readily accept the appellant's contention that whilst the K2 Form is a prescribed declaration form under the Customs Act 1967 for exported goods, the supply by the appellant taxpayer here to DOPL in Singapore is the R&D services. Thus, K2 Form is not necessary because it is not a requirement with respect to the export of services such as the R&D services. There is also some merit in the assertion that if there is no proof of supply, it follows that no GST should be raised on the taxpayer in the first place, considering the principle that GST is a tax on supply, not a tax on income.

[83] Now, it is well-established that judicial review is not an appeal from a decision but a review on the manner a decision is made (see *Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers* [1991] 1 MLJ 417). The three often quoted areas when a court would interfere as decided in the *Council of Civil Service Unions and others v Minister for the Civil Service* [1984] 3 All ER 935 are on the grounds of illegality, irrationality and procedural impropriety.

[84] In light of authorities authorising judicial intervention in judicial review cases such as the Court of Appeal decision in *Malaysian Oxygen Bhd v Soh Tong Wah and another appeal* [2015] 3 MLJ 730 we find that in making the impugned decision, the respondent had so manifestly taken into consideration factors that ought not to have been taken into account and had at the same time failed to take into account factors that ought to have been taken into consideration. It is also settled that this court can, by way of judicial review, interfere with the respondent's decision on the ground of illegality by scrutinising the decision not just for the process, but also for substance (see the

landmark Federal Court decision in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145).

[85] The respondent did not also adequately consider the express provisions of the GST Act and Zero-Rated Order, the well-established principles of construction of taxing statutes, and the generally understood concept of GST that is concerned with the levy on the supply of goods or services made within local jurisdiction.

[86] At the same time, such errors were exacerbated by the respondent having taken into consideration matters it should not have (such as s 14(2) of the GST Act, the requirement for K-Forms), and omitting matters it should have (such as not invoking s 65(3)), when applying the key provisions of s 65 of the GST Act and item 12 of the Second Schedule to the Zero-Rated Order. We must emphasise that a failure to take into account some relevant facts or that irrelevant facts had been taken into account renders the decision of the relevant authority such as the respondent, one which is tainted with illegality as stated in the Federal Court decisions in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 and *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1.

[87] For further emphasis and at the risk of repetition, the respondent did not correctly construe and apply the provisions of s 65 of the GST Act and the Zero-Rated Order but instead in its decision to issue the bill of demand produced opposite conclusions whereby the application of the same legal test resulted in on the one hand, DOPL being a person 'not belonging in Malaysia' for the purposes of s 65(6) but on the other hand, a person 'belonging in Malaysia' pursuant to para 2 of the Zero-Rated Order. It is inimical to the trite rule of statutory interpretation if a provision could be construed in a manner that flatly negate and render ineffective the effect of another provision in the same statute. And it is especially so when the former is a provision of a subsidiary legislation to the latter's parent statute.

CONCLUSION

[88] In light of the foregoing analysis and reasons, we conclude that the appointment of the appellant as the agent of DOPL under s 65(6) of the GST Act does not make the appellant to be an agency through which DOPL carries on its business in Malaysia (or otherwise became DOPL's fixed establishment in this country), pursuant to paras 2(2) and 2(3) of the Zero-Rated Order. As a result, the status of DOPL at the material time of the provision of the R&D services by the appellant was as one not belonging in the country. Neither does the fact that DOPL is GST-registered make it a person belonging in the country. Accordingly, the supply of the R&D services by the appellant to

DOPL should be treated as a zero-rated supply under item 12 of the Second Schedule to the Zero-Rated Order.

[89] The decision of the respondent issuing the bill of demand imposing 6% GST is therefore wrong, constitutes an error of law and an illegality which ought to be quashed by an order of certiorari.

[90] The bill of demand is thus quashed by an order of certiorari, and the decision of the High Court which had upheld the bill of demand and dismissed the judicial review application is hereby set aside. This appeal is therefore allowed, and we order costs of RM30,000 to the appellant, here and below.

Appeal allowed.

Reported by Ahmad Ismail